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KERAJAAN MALAYSIA v. PERWIRA BINTANG HOLDINGS SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
B DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-01(NCC)(A)-311-09-2013]
9 DECEMBER 2014

C ***ARBITRATION:*** *Award – Setting aside – Application to set aside specified paragraphs of award – Whether arbitrator decided on dispute contemplated by or falling within terms of submission – Whether award in clear excess of jurisdiction – Whether arbitrator's conclusion perverse and required intervention of court – Arbitration Act 2005, s. 37(1)(a)(iv), (2)(b), (3) & 42*

D ***ARBITRATION:*** *Award – Variation – Whether breach of s. 37(1)(a)(iv) of Arbitration Act 2005 could be basis for varying award – Whether power to effect variation only available under s. 42 of Arbitration Act 2005 – Criteria to be established for varying final award – Determining what constitutes question of law – Arbitration Act 2005, s. 42(1A)*

E The subject matter of this appeal was an arbitration award which was challenged by the respondent ('Perwira Bintang') in the High Court on the basis of ss. 37(1)(a)(iv), 37(2)(b) and 37(3) of the Arbitration Act 2005 ('the Act') to set aside ten identified paragraphs in the final award dated 24 October 2012 ('the award'). Perwira Bintang also applied to set aside or vary in part, or in whole, the award under s. 42 of the Act. The arbitration F concerned a domestic arbitration in relation to a claim for 'extra over' payment for piling work through 'hard rock' in a design-and-build construction contract where Perwira Bintang was the main contractor, and the appellant, the Government of Malaysia, was the owner/employer. The appellant was the respondent in the arbitration. The sole arbitrator in fact G found for Perwira Bintang on the issue of liability but dismissed its claim on the grounds that it had not proven the quantum of damages. The High Court Judge ('judge') concluded that the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. The judge treated the conclusion on quantum by the arbitrator H as flawed since the arbitrator had decided on a 'new difference'. The judge found the arbitrator's conclusion as 'almost perverse' and 'requires the intervention of this court.' The High Court thus allowed Perwira Bintang's application and struck out the disputed paragraphs under s. 37. Two other paragraphs (paras 152 and 153) were varied under s. 42 of the Act. The I appellant appealed against that decision contending that the judge had erred in setting aside the disputed paragraphs of the award, in deciding to vary para. 152 of the award to allow Perwira Bintang's claim for RM3,300,727 and in deciding to vary para. 153 of the award relating to costs of the

arbitration. Under the s. 37 application, the argument centred on s. 37(1)(a)(iv) on the basis that the arbitrator had decided on an award which dealt with a 'dispute not contemplated by or not falling within the terms of the submission to arbitration.' As for the s. 42 argument, the case concerned a 'reference on questions of law' said to 'arise from the award'. Six questions of law were raised and the judge decided on only two and varied paras. 152 and 153 of the award.

Held (dismissing appeal with costs)
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) Inasmuch as the courts must embrace the principles of finality of awards, party autonomy and minimal court intervention in the context of the UNCITRAL Model Law legal regime, the courts cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equally important principle that arbitration proceeding is consensual and the mandate of the chosen arbitrator has to be limited to the terms of the submissions and the agreed issues. (para 39)

(2) On the setting aside of the ten paragraphs, there was no reason to interfere with the decision of the judge. The arbitrator had introduced a 'new difference' which was irrelevant to the issues as submitted and agreed between the parties. (para 40)

(3) A breach of s. 37(1)(a)(iv) of the Act can be the basis of a setting aside of the whole or part of an award, but it cannot permit the court to vary an award. The power to effect a variation, however, is available under s. 42 of the Act. It was on this basis that the judge varied paras. 152 and 153 of the award. (para 41)

(4) With the insertion of s. 42(1A) of the Act, the court is cautioned against setting aside or varying an award unless the error of law substantially affects the rights of parties. It would thus appear this particular jurisdiction is not to be lightly exercised by the courts. (para 51)

(5) Based on case authorities, a number of propositions can be stated as guidelines: (i) the question of law must be identified with sufficient precision; (ii) the grounds in support must also be stated on the same basis; (iii) the question of law must arise from the award, not the arbitration proceeding generally; (iv) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights; (v) the question of law must be a legitimate question of law, and not a question of fact 'dressed up' as a question of law; (vi) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties; (vii) this jurisdiction under s. 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases; (viii) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable; (ix) the arbitral tribunal

remains the sole determiners of questions of fact and evidence; and (x) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse. (para 57)

(6) The determination of what constitutes 'a question of law' under s. 42 will involve a mixed consideration of relevant statutory rules, case laws and legal principles, and an identification of the relevant facts on which to apply the 'law'. (para 58)

(7) There were six questions of law referred to the High Court and the judge allowed only two, namely questions (v) and (vi). Questions (i) to (iv) were essentially questions of facts 'dressed up' as questions of law. Hence, the judge was right in dismissing them. (para 61)

Bahasa Malaysia *Translation Of Headnotes*

Subjek perkara rayuan ini adalah award timbang tara yang dicabar oleh responden ('Perwira Bintang') di Mahkamah Tinggi berdasarkan ss. 37(1)(a)(iv), 37(2)(b) dan 37(3) Akta Timbang Tara 2005 ('Akta') untuk mengenepikan sepuluh perenggan yang dikenalpasti dalam award terakhir bertarikh 24 Oktober 2012 ('award tersebut'). Perwira Bintang juga memohon untuk mengenepikan atau mengubah sebahagian, atau keseluruhan, award di bawah s. 42 Akta tersebut. Timbang tara tersebut melibatkan timbang tara domestik berkaitan dengan tuntutan 'extra over' bayaran bagi kerja-kerja pemantakan melalui batu-batu keras dalam kontrak pembinaan reka bentuk-dan-bina di mana Perwira Bintang adalah kontraktor utama, dan perayu, Kerajaan Malaysia, adalah pemilik/majikan. Perayu adalah responden dalam timbang tara. Penimbang tara tunggal sebenarnya membuat dapatan yang memihak kepada Perwira Bintang atas isu liabiliti tetapi menolak tuntutannya atas alasan-alasan bahawa ia tidak membuktikan kuantum ganti rugi. Hakim Mahkamah Tinggi ('hakim') memutuskan bahawa penimbang tara telah membuat keputusan terhadap suatu pertikaian yang tidak dipertimbangkan oleh, atau tidak terangkum dalam terma-terma penghujahan dalam timbang tara. Hakim menyifatkan kesimpulan bagi kuantum oleh penimbang tara sebagai cacat kerana penimbang tara memutuskan atas 'perbezaan baru'. Hakim mendapati bahawa keputusan penimbang tara sebagai 'hampir bercanggah' dan 'memerlukan campur tangan mahkamah ini'. Mahkamah Tinggi oleh itu membenarkan permohonan Perwira Bintang dan membatalkan perenggan-perenggan yang dipertikaikan di bawah s. 37. Dua perenggan yang lain (perenggan 152 dan 153) diubah di bawah s. 42 Akta. Perayu merayu terhadap keputusan tersebut dengan menghujahkan bahawa hakim telah terkhilaf dalam mengenepikan perenggan-perenggan award yang dipertikaikan, dalam memutuskan untuk mengubah perenggan 152 award untuk membenarkan Perwira Bintang menuntut RM3,300,727 dan dalam memutuskan untuk

mengubah perenggan 153 award tersebut berkaitan dengan kos timbang tara. Di bawah permohonan s. 37, penghujahan berkisar tentang s. 37(1)(a)(iv) atas dasar bahawa penimbang tara telah memutuskan bagi award yang berkait dengan 'pertikaian yang tidak dipertimbangkan atau tidak terangkum dalam terma-terma penghujahan dalam timbang tara'. Bagi penghujahan di bawah s. 42, kes tersebut berkait dengan 'rujukan atas persoalan-persoalan undang-undang' yang dikatakan 'timbul daripada award'. Enam persoalan undang-undang dibangkitkan dan hakim hanya memutuskan dua persoalan dan mengubah perenggan 152 dan 153 award tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Walaupun mahkamah mesti mematuhi prinsip kemuktamadan award, autonomi pihak, dan campur tangan minimum oleh mahkamah dalam konteks regim undang-undang UNCITRAL Model Law, mahkamah tidak boleh membenarkan sesuatu award bercanggah dengan bidang kuasa yang jelas berlebihan dan melanggar prinsip yang sama pentingnya di mana prosiding timbang tara adalah dipersetujui dan mandat penimbang tara yang dipilih perlu dihadkan kepada terma-terma penghujahan dan isu-isu yang dipersetujui.

(2) Bagi pengenepian kesemua sepuluh perenggan, tidak ada alasan untuk campur tangan dengan keputusan hakim. Penimbang tara telah memperkenalkan 'perbezaan baru' yang tidak relevan kepada isu-isu seperti yang dikemukakan dan dipersetujui antara pihak-pihak.

(3) Pelanggaran s. 37(1)(a)(iv) Akta boleh menjadi asas pengenepian keseluruhan atau sebahagian award, tetapi ia tidak boleh membenarkan mahkamah membezakan sesuatu award. Kuasa untuk menguatkuasakan pengubahan, walau bagaimanapun, wujud di bawah s. 42 Akta. Atas dasar inilah hakim mengubah perenggan 152 dan 153 award.

(4) Dengan memasukkan s. 42(1A) Akta, mahkamah diarahkan untuk berjaga-jaga terhadap mengenepikan atau mengubah sesuatu award kecuali kekhilafan undang-undang secara besarnya menjejaskan hak pihak-pihak. Oleh itu, ia akan kelihatan seperti bidang kuasa khusus ini tidak boleh dilaksanakan dengan sewenang-wenangnya oleh mahkamah.

(5) Berdasarkan autoriti-autoriti, beberapa kesimpulan boleh dinyatakan sebagai garis panduan: (i) persoalan undang-undang mesti dikenal pasti dengan ketepatan yang mencukupi; (ii) alasan-alasan yang menyokong mesti dinyatakan atas alasan yang sama; (iii) persoalan undang-undang mesti terbentuk daripada award, bukan daripada prosiding timbang tara secara amnya; (iv) pihak yang merujuk persoalan undang-undang tersebut mesti memuaskan mahkamah bahawa pemutusan persoalan undang-undang tersebut akan secara besarnya memberi kesan kepada hak-haknya; (v) persoalan undang-undang mestilah persoalan undang-

undang yang sah, dan bukan persoalan fakta yang dikaburi sebagai persoalan undang-undang; (vi) mahkamah mesti menolak rujukan tersebut jika pertimbangan persoalan undang-undang tersebut tidak akan memberikan kesan kepada hak pihak-pihak secara besar; (vii) bidang kuasa ini di bawah s. 42 tidak boleh dilaksanakan dengan sewenang-wenangnya, dan perlu dilaksanakan hanya dalam kes-kes yang jelas dan terkecuali; (viii) walau bagaimanapun, mahkamah wajar campur tangan jika award adalah nyata tidak sah atau tidak berpatutan; (ix) tribunal timbang tara kekal penentu tunggal persoalan fakta dan keterangan; dan (x) sementara dapatan fakta dan pemakaian prinsip-prinsip undang-undang oleh tribunal timbang tara mungkin salah (dalam contoh dapatan fakta dan undang-undang yang bercampur), mahkamah tidak wajar campur tangan kecuali keputusan tersebut bercanggah.

(6) Penentuan mengenai apa yang membentuk 'persoalan undang-undang' di bawah s. 42 akan melibatkan pertimbangan bercampur kaedah-kaedah statutori yang relevan, kes-kes dan prinsip-prinsip undang-undang, dan pengenalpastian fakta-fakta relevan yang terhadapnya 'undang-undang' terpakai.

(7) Terdapat enam persoalan undang-undang yang dirujuk kepada Mahkamah Tinggi dan hakim membenarkan hanya dua, iaitu persoalan (v) dan (vi). Persoalan-persoalan (i) hingga (iv) adalah pada asasnya persoalan-persoalan fakta yang dikaburi sebagai persoalan undang-undang. Oleh itu, hakim betul dalam menolaknya.

Case(s) referred to:

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

CRW Joint Operation v. PT Perusahaan Gas Negara [2011] 4 SLR 305 ***(refd)***

Finelvet AG v. Vinava Shipping Co. Ltd, The Chrysalis [1983] 1 Lloyd's Rep 503; [1983] 1 WLR 1469 ***(refd)***

Georges SA v. Trammo Gas Ltd (The Belarus) [1993] 1 Lloyd's Rpe 215 ***(refd)***

Gold and Resource Development (NZ) Ltd v. Doug Hood Limited [2000] 3 NZLR 318 ***(refd)***

Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd ("TLL"), A Thai Company & Anor [2013] 1 LNS 83 HC ***(refd)***

Maimunah Deraman v. Majlis Perbandaran Kemaman [2011] 9 CLJ 689 HC ***(refd)***

Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd [2013] 8 CLJ 655 HC ***(refd)***

Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd [2009] 1 LNS 1766 HC ***(refd)***

PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR (R) 597 ***(refd)***

PT Prima International Development v. Kempinski Hotel SA & Other Appeals [2012] SGCA 35 ***(refd)***

Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd [2010] 3 SLR 1 ***(refd)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 24
Arbitration Act 2005, ss. 8, 37(1)(a)(iv), (2)(b), (3), 42(1), (4), (1A)

For the appellant - Noerazlim Saidil (Rafidah Che Aziz with her); SFC
For the respondent - Cyrus Das (S Selvarajah, Lam Ko Luen & James Lopez with him); M/s Fernandez & Selvarajah

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D-24NCC(ARB)-8-02-2013]

Reported by Amutha Suppayah

JUDGMENT

Mohamad Ariff Yusof JCA:

Subject Matter And The Parties

[1] The subject matter of this appeal is an arbitration award which was challenged by the present respondent, Perwira Bintang Holdings Sdn Bhd, in the High Court on the basis of ss. 37(1)(a)(iv), 37(2)(b) and 37(3) of the Arbitration Act 2005 ('the Act') to set aside identified paragraphs in the final award dated 24 October 2012 ('the Award'). Altogether, the application under s. 37 of the Act was to set aside ten paragraphs in the award. These paragraphs are paras. 117, 118, 120, 121, 122, 123, 124, 125, 139 and 140. As a further and alternative prayer, Perwira Bintang Holdings Sdn Bhd also applied to set aside or vary in part, or in whole, the award under s. 42 of the Act.

[2] The arbitration concerned a domestic arbitration in relation to a claim for "extra over" payment for piling work through "hard rock" in a design-and-build construction contract where Perwira Bintang Holdings was the main contractor, and the Government of Malaysia the owner/employer.

[3] Perwira Bintang Holdings Sdn Bhd was the claimant in the arbitration proceeding, and the plaintiff in the High Court action to set aside or vary the award. Hence, the present appellant, the Government of Malaysia, was the respondent in the arbitration and the defendant in the High Court action.

[4] The sole arbitrator in fact found for the present respondent on the issue of liability, but dismissed its claim since it had not proven the quantum of damages.

[5] For clarity, we will refer to the parties by name, namely the Government of Malaysia ('Government') as the appellant and Perwira Bintang Holdings Sdn Bhd ('Perwira Bintang') as the respondent in this appeal. The respective positions of the parties are thus as follows:

A Perwira Bintang : claimant (in the arbitration)/plaintiff/respondent

Government : respondent (in the arbitration)/defendant/appellant

Decision Of The High Court

[6] The High Court, for reasons to be stated later in this judgment, B allowed Perwira Bintang's application and struck out the earlier mentioned paragraphs under s. 37 and two other paragraphs (paras. 152 and 153) under s. 42 of the Act. Being dissatisfied with the High Court's decision, the Government brings this appeal. The memorandum of appeal rests on the basic grounds that the learned High Court Judge had erred as a whole, in law C and on the facts, in allowing Perwira Bintang's application under s. 37 and s. 42 of the Act. More specifically, the learned judge is said to have erred in law and in fact when setting aside paras. 117, 118, 120 to 125, 139 and 140 of the award when deciding to vary para. 152 of the award to allow Perwira Bintang's claim for RM3,300,727, and when deciding to vary para. D 153 of the award (which related to costs of the arbitration).

[7] It will be seen, therefore, that the application under s. 37 was to set aside part of the award, whereas the application under s. 42 was to vary two paragraphs of the award.

The s. 37 Argument E

[8] Under the s. 37 application, the argument centred on s. 37(1)(a)(iv) on the basis that the arbitrator had decided on an award which dealt with a "dispute not contemplated by or not falling within the terms of the submission to arbitration." This is clearly a "jurisdiction" argument. Perwira F Bintang also argued on the basis of s. 37(2)(b), a procedural point on a breach of the rules of natural justice, and a point, as we understand it, which flowed from the basic jurisdiction point. The third ground under s. 37 related to s. 37(3), which is another procedural issue to allow the separation of the offending parts of the award from the unobjectionable parts so as to allow the setting aside of these offending parts. G

The s. 42 Argument

[9] As for the s. 42 argument, this aspect of the case concerned a "reference on questions of law" said to "arise from the award". Six questions of law were raised. The learned judge decided on only two, and, as already H alluded to, varied the two paragraphs, namely paras. 152 and 153 of the award.

The Underlying Policy Considerations

[10] Underlying these detailed legal arguments is the important issue of the I extent to which courts should interfere with an arbitration award in the context of the Act which has made it clear in s. 8 (as amended) that no court shall intervene in matters governed by the Act "except where so provided in [the] Act." The policy to be adopted by our courts is that of minimal

intervention consistent with the policy underlying the UNCITRAL Model Law, which Malaysia has incorporated with suitable amendments. Section 37 mirrors the Model Law (Article 34). However, s. 42 has no direct equivalent provision in the Model Law. Nevertheless, this court has to carefully consider whether we should strictly construe and adhere to the principles of party autonomy, finality of arbitration awards and minimal court intervention rigidly on the facts of this appeal, even though in the context of a domestic arbitration. We have kept these issues uppermost in mind, since the grounds advanced by Perwira Bintang and addressed by the learned judge in the High Court, have brought these issues to the fore.

[11] Suffice for us to refer to our Federal Court judgment in *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 and *Ajwa For Food Industries Co (MIGOP), Eqypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 as authorities in point.

[12] In *The Government of India v. Cairn Energy India Pty Ltd & Anor*, *supra*, Richard Malanjum CJ (Sabah & Sarawak) held:

> We note that the arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations – one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the learned arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.
>
> And as Scrutton LJ put it "... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment. (see *African & Eastern (Malaya) Ltd v. White, Palmer & Co Ltd* (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v. Dato' Teong Teck Leng* [1996] 1 MLJ 178 ..." (at p. 462)

[13] In *Ajwa For Food Industries Co (MIGOP), Eqypt v. Pacific Inter-Link Sdn Bhd & Another Appeal*, *supra*, Ramly Ali JCA (now FCJ) stated:

> Section 37(1) of the Arbitration Act 2005 provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court's discretion in setting aside the arbitral award is now limited to the narrowly defined circumstances in line with modern international practice. The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act is that the court should be slow in interfering with an arbitration award ... (at p. 405)

[14] We will address these general issues at appropriate stages in this judgment.

A

The Background Facts

[15] Turning now to the background facts, Perwira Bintang succeeded in its claim to establish liability for the payment of the "extra over" claim, but failed in establishing quantum such that the arbitrator dismissed its claim. In the originating summons action, the learned judge set aside the paragraphs earlier mentioned and varied the award to allow Perwira Bintang's claim up to the amount of RM3,300,727 with costs of the arbitration in its favour.

[16] The contract in question was for a contract sum of RM320 million. It was a design-and-build negotiated contract for the construction of an office tower block in Bukit Aman for the project described as "Cadangan Pembinaan Kompleks KDN/KA & Logistik, Bukit Aman". As noted earlier, the subject matter of the dispute between the parties was payment for piling works. The description and rates for the piling works were based on provisional bills of quantities. The rates were included in the "contract sum analysis" identified in the contract as s. 2, appendix 5 of part 5. The rates for both preliminary piles and working piles were stated as:

Bore 600 mm Diameter vertical holes including drilling in all soils (excluding hard rock) and temporary casings and linings	86.90/metre
Ditto 1500 mm ditto	322.96/metre

[17] The relevant document appears at pp. 213-214 of the appeal record, vol. II, part C.

[18] For emphasis, we underscore the words "in all soils (excluding hard rock)".

[19] Perwira Bintang had to bore through hard rock/material in the course of the piling works resulting from a variation in the design required by the Government. The changes made to the original piling works design were to suit "aspects of suitability, functionality and safety pursuant to directions from Cawangan Pakar dan Kejuruteraan Awam" of JKR. (See para. 72.5.2 of the award)

[20] It is not in dispute that Perwira Bintang had to bore through hard rock/material, and on the pleadings, the Government did not dispute the presence of hard rock. While Perwira Bintang and the Government both agreed that there was no express rate stated for boring through hard rock, each party took completely different positions. Perwira Bintang argued it was entitled to be paid at market rate for the piling through hard rock. The Government, on the other hand, disclaimed liability by resorting to cls. 27.3 and 27.4 of the contract under which allegedly any extra costs occasioned by any variation to the piling design had to be borne by Perwira Bintang itself. The expert opinions adduced in the arbitration proceeding confirmed the presence of hard rock, being rock with "uniaxial compressive strength values

in excess of 50 MPa". There was agreement too on the rate for boring through hard rock, namely RM1,091 per metre for 600mm diameter bored pile and RM2,929 per metre for 1,500mm diameter bored pile.

[21] The general length of the piling through hard rock was available from the piling records, and this formed the basis of Perwira Bintang's claim for the extra over payment, namely 1,077m of bored length in respect of 1,500mm piles and 134m of bored length for 600mm piles. However, the exact length of the hard rock encountered was not established. On this basis, the arbitrator, having found in favour of Perwira Bintang on liability, nevertheless dismissed the claim on quantum.

Finding Of "New Difference" By The High Court

[22] The learned High Court Judge considered the background facts in some detail. Her Ladyship also evaluated the issues formulated by the arbitrator, as agreed and modified by both parties. Her Ladyship considered the detailed finding of the arbitrator, which was quoted *in extenso*, but concluded that the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. This is an area of arbitration law which allows the court to set aside an award on the ground that an arbitrator had decided on a "new difference" which is irrelevant to the claim, the "new difference" being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission. The underlying rationale for this rule rests on the consensual nature of arbitration. Parties are not compelled to resort to arbitration contractually, but if they provide for it and refer their dispute to arbitration, the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties. This rationale is stated succinctly by the Court of Appeal, Singapore in *PT Prima International Development v. Kempinski Hotel SA & Other Appeals* [2012] SGCA 35:

> An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.

[23] This case was cited by Her Ladyship, together with several other decisions of the Singapore Courts, such as *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR (R) 597, *CRW Joint Operation v. PT Perusahaan Gas Negara* [2011] 4 SLR 305 and *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1.

[24] These persuasive cases, and others, that have been addressed by our courts lay down one basic principle – an arbitrator must decide the dispute according to the scope of the arbitration and he cannot decide the dispute on

issues that have not been raised or addressed by the parties. This basic principle arose in the High Court case of *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd ("TLL") A Thai Company & Anor* [2013] 1 LNS 83, where Lee Swee Seng JC (as he then was) said:

> Whilst it is generally stated that under the Model Law regime as reflected in the AA 2005, there is a palpable shift towards non-interference in international arbitration award especially on issues of error of law so called, yet where jurisdiction is concerned, the Model Law does recognize and respect court's interference where arbitrators have acted outside their jurisdiction and this principle is reflected in ss. 37(1)(a)(iv) and (v) of the AA 2005 ... (at pg. 18 of the Judgment)

[25] Lee Swee Seng, JC expressly referred to and adopted the reasoning shown in the Singapore authorities, namely *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, *supra*, and *CRW Joint Operation v. PT Perusahaan Gas Negara*, *supra*.

[26] A differently constituted panel of this court agreed with the High Court's decision and dismissed the appeal.

[27] As far as the Model Law is concerned, our s. 37(i)(a)(iv) and s. 37(3) correspond with art. 34(2)(a)(iii) which provides:

> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[28] *Redfern, Hunter, Blackaby & Partasides, Law and Practice of International Commercial Arbitration* (4th Ed.) offers this relevant commentary:

> This third ground of challenge under the Model Law contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it ...

[29] We now turn to consider whether on the facts and circumstances of this present appeal, there was a "new difference" introduced and decided by the arbitrator.

[30] We start with considering the issues that were before the arbitrator. At the outset, the arbitrator had formulated four issues for the parties' consideration, as follows:

(i) What is "hard rock" for the purposes of the contract?

(ii) Was hard rock encountered during bored piling works?

(iii) If yes, whether extra-over payment is due for boring through hard rock?

(iv) If yes, at what rate?

[31] Perwira Bintang as the claimant agreed with these formulated issues. The government restated the issues to read:

(i) Whether the claimant is entitled to claim for extra over under the contract?

(ii) If yes, whether hard rock was encountered during piling works.

(iii) If yes, at what rate?

[32] To quote the pertinent parts of the award:

I. THE ISSUES

69. As stated above I had proposed that the four main issues in this arbitration are:

69.1 What is "hard rock" for the purposes of the Contract?

69.2 Was hard rock encountered during bored piling works?

69.3 If yes, whether extra-over payment is due for boring through hard rock?

69.4 If yes, at what rate? ("Rock Boring Issue")

70. Over the course of the arbitration, the Parties have come to an agreement with regard to the Rock Boring Rate Issue above being the rate of boring through hard rock which is no longer in contention. In this connection, the Claimant had adopted the "extra over" rates stated in the answer to Question 11 in HBH-R's witness statement and the agreed rates are RM1,091.00/metre for 600 mm diameter bored pile and RM2,929.00/metre for 1500 diameter bored pile.

71. In their submissions:

71.1 The Claimant agreed with the issues put forward by me.

71.2 The Respondent stated that the issues to be decided were as follows:

71.2.1 Whether the Claimant is entitled to claim for extra over under the Contract?

71.2.2. If yes, whether hard rock [was] encountered during piling works.

71.2.3. If yes, at what rate?

In view of this, Respondent had added an additional issue in item 70.2.1 *(sic)* to be decided.

[33] Thus, it was acknowledged there were five related issues. The Rock Boring Rate was agreed between the parties. The government disputed whether "hard rock" was encountered by an amendment to its pleaded defence, and an attempt to draw a distinction between hard rock and rock. Further, the government took the position that the contract did not allow for

A extra-over payment in any event. The government paid for the length of the piling but at the "all soils" rate. The pertinent amendments to the defence read:

> 7. Refer to paragraph 7 of the Claim, the Respondent agrees that the description of works and rates for piling works does not include
B drilling works through hard strike through/rock.
>
> 9. With regard to paragraph 8 of the Claim, the Respondent had received copies of soil investigations and a report namely "Classification and Strength Determination of Rock in Bored Pile Holes, Bukit Aman, KL", done by G.E.M. Exploration Sdn Bhd
C dated July 2006.
>
> The respondent does not dispute as to the presence of the hard material strike through. However, the Respondent avers that the design for the pile to use bore pile at the average driven length of 25 meters was based on soil investigation carried out by Claimant which revealed that out of
D the 7 boreholes at the depth of 30 to 50 meters only one bore hole encountered rock at the depth of 51 meters. Under Sub-Clause 2.2 Conditions of the Contract, the Contractor (Claimant) shall be fully responsible for the design and guarantee the Government (Respondent) of any fault to the design. Further, the Respondent states that any variations to the design which resulted in extra cost, the Claimant is not
E entitled to claim as provided under Sub-Clauses 27.3 and 27.4 Conditions of Contract.
>
> ...
>
> 10. Paragraphs 9 and 10 of the Claim are denied on the ground that the description of works for the pile as provided in section No. 2 of
F Appendix 5 of Part 5 (Volume I of III) of the Contract did not include for drilling works through hard material/ rock and /or if the pile had reached the bedrock.

[34] After the close of the submissions by the parties, the arbitrator had requested both parties to submit further written submissions and
G clarification. This part of the proceeding is noted in the award in paras. 57 and 58, which we quote below:

> 57. By a letter dated 10.10.2012, I requested both Parties for further submissions/clarification as follows:
>
> 57.1 Bundle A2 contains a document entitled "Field Description of
H Soil and Rock Guidelines for the field classification and description of soil and rock for engineering purposes by the NZ Geotechnical Society Inc December 2005". Page 25 of this document contains the following statement:
>
> Commonly, rocks with qu values in excess of 50 MPa are
I informally referred to as "hard" rocks and those less than 20MPa (especially <10MPa) as "soft" rocks.

57.2 If we were to assume (and this is yet to be decided) that hard rock consists of rocks with qu values in excess of 50 MPa, please submit on the following issues:

57.2.1 Whether it is possible to ascertain from the evidence **the lengths of hard rock** that has been bored in respect of 600mm and 1,500mm diameter piles?

57.2.2 If yes, **how many metres of hard rock** have been bored in respect of 600mm and 1,500mm diameter piles? (emphasis added)

I directed the Parties file and exchange further submissions on the above by 17.10.2012.

58. On 17.10.2012, the Claimant and Respondent filed their respective further written submissions.

[35] The further written submissions of the parties appear from pp. 473 to 495 of the appeal record, part C, vol. III. Perwira Bintang argued that the government must remain bound by its pleaded case and not resile from its position that Perwira Bintang had bored through hard rock. Perwira Bintang raised the issues of estoppel and the principle that the arbitrator should not attempt to improve the pleaded case of the government. As for evidence of the length and quantity of rocks with qu values in excess of 50 MPa, Perwira did allude to the argument that it would have been "practically impossible" to do so. See paras. (39) to (41) of Perwira Bintang's submission appearing at p. 487 of the appeal record, part C, vol. III:

(39) The Claimant candidly acknowledges that if it were to adopt the assumption that hard rock consists of rocks with qu values in excess of 50 MPa then there is no direct evidence for the lengths of hard rock that has been bored in respect of 500 mm and 1500 mm piles on the assumption that hard rock is rock with qu value in excess of 50 MPa.

(40) This is because there was no reason for the Claimant to have tested each and every bit of material excavated in the bored piling works to establish its qu value. It would be contrary to commercial practice, and in fact it would be practically impossible to have done so. All that could have been done practically would be to take random samples and test them.

(41) However, it is submitted, that since at all material times during the piling works and immediately thereafter, there was no denial that the Claimant had bored through rock, there was no need for the Claimant to even consider doing this random sampling and testing.

[36] The arbitrator dealt with the evidence, the law and the respective submissions of the parties in considerable detail. In his "summary of findings", the arbitrator stated as follows:

A L. Summary of Findings

136. Based on what has been discussed above, I have made, *inter alia*, the following findings:

138.1. Based on an interpretation of the Contract especially having regard to Section 2, the Claimant is entitled to claim extra over claims in respect of boring through hard rock during piling works.

138.2. The Claimant is entitled to extra over claims for boring through hard rock at the rate of RM1,091.00 per meter for 600 mm diameter bored pile and RM2,929.00 per meter for 1500 diameter bored pile.

138.3 For the purposes of Section 2 of the Contract, the word "hard rock" refers to rock with uniaxial compressive strength values in excess of 50 MPa.

138.4 Hard rock was indeed encountered during piling works.

138.5. However, extra-over payment is NOT due for boring through hard rock as the Claimant has failed to prove the quantum of hard rock that was bored during piling works. It is not possible to tell from the piling records the length of hard rock that was bored as these records do not distinguish between hard rock and other rock with uniaxial compressive strength values below 50 MPa.

139. In the final analysis, the Claimant has proved its claim in terms of liability in the sense that it has established that it is entitled to be paid for extra over costs for boring through hard rock and that hard rock was in fact encountered during piling works. Further, the reasonable rate to be paid for this item of work has also been established. But the Claimant has failed in terms of quantum in that it has not provided how much hard rock had been bored during the piling works.

140. Under the circumstances, I am constrained to dismiss the Claimant's claim.

[37] The learned judge, as we have seen earlier, treated this conclusion on quantum by the arbitrator as flawed since the arbitrator had decided on a "new difference", as the term is understood in the cases. Her Ladyship found the arbitrator's conclusion as "almost perverse" and "requires the intervention of this court." Her Ladyship held that it was "quite apparent" that the award "involved a new difference or such matters which would have been irrelevant to the issues requiring determination", stating that the "new difference" was "the matter of length or quantity of hard rock which was irrelevant to the issue of entitlement to the extra-over claims because there was no dispute on this as seen from the documentation and conduct of the parties." Her Ladyship also noted that the government made no reference to the issue of proof of the length or quantity of hard rock in its submissions.

[38] Her Ladyship stated at paras. [86] to [90] of her judgment as follows: A

> [86] From the terms of the Award it is apparent that the quantity, length or amount of hard rock bored by the Plaintiff was never an issue of concern between the contracting parties. While the parties may have agreed to the four issues identified by the learned Arbitrator with reservations of their rights, here was no submission or address by the B parties on a fifth issue; the fifth issue being one concerned with the quantity of hard rock found. The amount, length or quantity of hard rock was furthest from the parties' minds; in other words, it was not an issue at all between them. The parties' conduct is testimony of that. Most important, the Defendant had already paid for those lengths, but it had paid on grounds and at rates that the Plaintiff disputed ... C
>
> [89] I therefore quite agree with the Plaintiff that those particular paragraphs of the Final Award must be set aside. This "5th issue" arose only when the learned Arbitrator sought clarifications and this was long after conclusions of hearing. It was a "new difference" which was irrelevant to the determination of the dispute and it was not even a D disputed matter between the parties. The Plaintiff had protested against this and its reasons are sound and valid.
>
> [90] On this ground alone, the Court will intervene to set aside the relevant paragraphs of the Final Award. In such circumstances, there is no need for the Court to examine whether the other ground relied on by the E Plaintiff has been met; that is that the award is in conflict with the public policy of Malaysia.

The Findings Of This Court On s. 37 And The Policy Considerations

[39] We have considered the appeal record, in particular the reasoning and findings of the arbitrator. Inasmuch as our courts must embrace the F principles of finality of awards, party autonomy and minimal court intervention in the context of the Model Law legal regime, and the more general considerations that our courts should be arbitration-friendly and pro-enforcement, we cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equally important principle that arbitration G proceeding is consensual and the mandate of the chosen arbitrator has to be limited to the terms of the submissions and the agreed issues. If four issues have been agreed, the arbitrator cannot, on his own volition, add another issue (particularly without prior consensus and after the close of the case of the parties), for to allow this will result in gross unfairness. On the facts of H this case, Perwira Bintang had lost its opportunity to introduce evidence through witnesses, if need be, to establish the length and quantity of hard rock bored, or even to prove by evidence that it would be commercially impractical to do so. Her Ladyship chose not to proceed further to consider the issue of breach of natural justice rules and the issue of conflict with "public policy", choosing instead to relying wholly on s. 37(1)(a)(iv) of the I Act. The reluctance to proceed further is warranted, since the setting aside argument is not premised on s. 37 (1)(b). Section 37(2) comes into play only

A when "conflict with public policy of Malaysia" is made a ground under s. 37(1)(b). Thus, we too are of the view that this appeal does not need to address the issue of conflict with the public policy of Malaysia.

[40] Hence, on the setting aside of the ten paragraphs, we see no reason to interfere with the decision of the learned judge below. We agree that on the B facts of this appeal, the learned arbitrator had introduced a "new difference" which was irrelevant to the issues as submitted and agreed between the parties.

[41] As noted earlier, a breach of s. 37(1)(a)(iv) of the Act can be the basis of a setting aside of the whole or part of an award, but it cannot permit the C court to vary an award. The power to effect a variation, however, is available under s. 42 of the Act. It was on this basis that the learned judge varied paras. [152] and [153] of the award.

The Detailed Arguments On s. 42: Reference On Questions Of Law

D **[42]** We now address the arguments on s. 42, which concerns a reference on a question or questions of law arising from an award.

The Decision On The Reference On Questions Of Law Under s. 42 Of The Act

E **[43]** Unlike the evaluation and analysis of the dispute under s. 37 of the Act, the learned judge devoted only six paragraphs of the comprehensive judgment to that aspect concerning s. 42. There were altogether six questions of law posed to the court, but Her Ladyship was persuaded by only two of these, namely Questions of Law (v) and (vi).

F **[44]** The stand taken by the appellant is that all six questions of law are essentially questions of fact "dressed up" as questions of law, and therefore cannot fall within the ambit and purpose of s. 42.

[45] Section 42(1) provides that any party "may apply to the High Court to determine any question of law arising out of an award." An amendment G in 2011 has included sub-s. (1A) which reads:

> The High Court shall dismiss a reference made under sub-section (1) unless the question of law substantially affects the rights of one or more of the parties.

H **The Developing Case Law**

[46] We have considered the several cases, which have been decided by our courts on the approach to be taken, and the meaning to be ascribed to s. 42. Both parties have referred to an earlier decision of the High Court in *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766; [2011] 3 I AMR 315 (over which I presided). I then had occasion to offer the following view:

> In my view, the emphasis on the words "arising out of an award" is a pertinent one. A question of law must arise out of an award, and not out of the arbitration. As such, the jurisdiction conferred on the court should be a limited one, more in line with the jurisprudence on error of law on the face of the award.

[47] In the subsequent case of *Maimunah Deraman v. Majlis Perbandaran Kemaman* [2011] 9 CLJ 689, parties had agreed that the same jurisprudence should apply. In *Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655; [2013] 5 MLJ 98, a similar sentiment was echoed.

[48] In this appeal too, counsel for the respondent agrees likewise. Counsel for the appellant, however, has also referred to the more recent decision of the High Court in *Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (OS No: 24NCC(ARB)-3-01/2013), where a less limited view of the provision has been proffered. Nallini J (now JCA) was of the view that the test under s. 24 of the Arbitration Act 1952 (the "error of law on the face of the award" test) should not be extended to s. 42 of the present Act. Nallini J held:

> Under the previous section 24 of the repealed Arbitration Act 1952, the test for setting aside awards under the section was whether an error of law on the face of the record arose ... That section being repealed, it would follow that the test previously applied in respect of the repealed section 24 ought not logically be extended or utilized in respect of the new section 42 of the Arbitration Act 2005. (paragraph 51 of the Judgment)

> A comparison of the two sections, namely section 24 of the repealed Arbitration Act 1952 and the present section 42 are quite evidently different and distinct. Section 42 allows "any question of law arising out of an award" to be brought by "any party" by way of a reference to the High Court. Given the clearly wider ambit of this section, as compared to the prior section 24 of the repealed Arbitration Act, it is evident that the question that a court needs to ask itself is whether the question framed before it is indeed a question of law. (para. 54)

[49] The views expressed in *Exceljade*, *supra*, clearly differs from the earlier view expressed in *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd*, *supra*, where I had expressed the view that the governing principles on error of law on the face of the award was "too well entrenched in our law to be simply discarded as an accident of legislation." Counsel for the respondent has expressly referred to this passage and agreed with it.

[50] As indicated earlier, *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd*, *supra*, was the first case argued and reported on the new s. 42 of the Act, prompting me to also add the following passage in the judgment:

> I must say this line of argument by the defendant is very convincing and has clear support by way of principle and authority. I share the view the jurisprudence on "error of law on the face of the award" is very well entrenched in Malaysian law such that any attempt to have it displaced must accordingly find strong statutory authority and rationale. As indicated earlier in this judgment, the Malaysian statutory provision,

A unlike the UK provision, does not expressly exclude the application of error of law on the face of the award." It will be therefore consistent with principle and authority, and consistent as well with established principles of statutory interpretation, for this court to agree with the view taken by the defendant. Further, I have taken note of the New Zealand equivalent statutory provisions and their subsequent amendments, such that it will B be fair to conclude that short of an express statutory amendment, it will be too drastic and unwise for this court to adopt the position taken by the plaintiff. Briefly put, the established jurisprudence and current statutory provision cannot simply allow the court to reverse the entire jurisprudence on "error of law on the face of the award". It may be that over time and through the gradual interpretative process reflective of the C common law method and tradition, the technical rigours of this particular law (such as the need, for instance, of having a clear proposition of law on which the award depends evident in the award itself) might in particular cases be loosened, but to say this cannot be the same as saying s. 42 of the Arbitration Act 2005 allows the court the leeway suggested by the plaintiff. (pp. 336 - 337 of the report) D

[51] Since this case was decided, Parliament has inserted sub-s. (1A) to s. 42, such that as a matter of statutory interpretation, the court is now cautioned against setting aside or varying an award unless the error of law substantially affects the rights of parties. It would thus appear this particular E jurisdiction is not to be lightly exercised by the courts, as indicated by the very terms of the provision:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection(1) F unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is G sought.

(4) The High Court may order the arbitral tribunal to state the reasons to its award where the award-

(a) does not contain the arbitral tribunal's reasons; or

H (b) does not set out the arbitral tribunal's reasons in sufficient detail ... (emphasis added)

[52] The statutory wording mandates the court to dismiss ("shall dismiss") the reference on the question of law unless the question of law affects in a substantial way the rights of the party or parties. Additionally, the court may I require the arbitral tribunal to provide the reasons for its award if the award does not contain the reasons, or contain reasons that are not in sufficient detail.

The Effect Of *Exceljade*

[53] With the amendment, and reading the provision in its overall context, the views expressed in *Exceljade*, *supra*, should perhaps now be preferred. However, on the special facts of a particular appeal, the previous jurisprudence and the new law may just overlap. This is the position taken by the appellant. Counsel for the appellant submits:

> It is submitted that regardless of whether the test for section 42 of the AA 2005 is error of law arising out of an award or question of law arising out of the award, the Malaysian authorities recognizes that the arbitrator is the master of facts.

[54] Nevertheless, the *Exceljade* approach will align our law with that of other jurisdictions where the old jurisprudence on "error of law on the face of the award" has been rejected.

[55] Our Act, being closely modelled on the New Zealand legislation, it will be helpful in particular to state the approach taken in that jurisdiction, although, unlike our law, NZ law has an express statutory definition of "question of law", in the form of cls. 5(10)(a), (b) of Schedule 2 of the Arbitration Act 1996. Nevertheless, the common statutory wording "arising out of an award" appears in both. A leading text in New Zealand, *Williams & Kawharu on Arbitration* (Lexis Nexis NZ; 2011) analyses the law thus:

> 18.4.4. Meaning of "arising out of an award"
>
> > The question of law must, in terms of Clause 5(1), be a question "arising out of an award" ... Clause 5(10)(a) also makes clear that the question does not need to appear "on the record." A question of law may arise out of an award if there is no explicit ruling on the matter, provided that the question is not a new point and can be argued on the facts found by the Tribunal, on the basis that the Tribunal has applied the wrong legal standard to the facts ... (at page 516 of the text)

[56] The broader approach that a question of law "arising out of an award" should not be taken to mean that the question of law must appear "on the record" (ie, within the four corners of an award), will be consistent with our own statutory scheme, especially when s. 42(4) is considered.

Some Governing Principles Under s. 42

[57] On the present case-authorities, a number of propositions can be stated as guidelines. We enumerate these below, without intending them to be exhaustive, since clearly the law has to be developed further.

(a) The question of law must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; *Maimunah Deraman v. Majlis Perbandaran Kemaman*, *supra*;

(b) The grounds in support must also be stated on the same basis;

(c) The question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd*, *supra*, *Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*, *supra*);

(d) The party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) The question of law must be a legitimate question of law, and not a question of fact "dressed up" as a question of law (*Georges SA v. Trammo Gas Ltd (The Belarus)* [1993] 1 Lloyd's Rpe 215);

(f) The court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*, *supra*);

(g) This jurisdiction under s. 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655);

(h) Nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;

(i) The arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Development (NZ) Ltd v. Doug Hood Limited* [2000] 3 NZLR 318); and

(j) While the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

The Issue Of Recognising What Is A Question Of Law

[58] It has to be stated and recognised, however, that the issue of what constitutes "a question of law" is a difficult one. Nallini J in *Exceljade*, *supra*, has helpfully addressed this vexed issue by drawing on the acute observations of Mustil J in *Finelvet AG v. Vinava Shipping Co Ltd, The Chrysalis* [1983] 1 Lloyd's Rep 503; [1983] 1 WLR 1469. We reproduce the useful analysis by Nallini J below:

> Mustil J then goes on to consider the proper test or approach to be adopted by a court determining the substantive appeal which turns on a question of law arising out of the arbitration:
>
> > … Starting therefore with the proposition that the court is concerned to decide on the hearing of the appeal whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages. (1) *The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.* (2) *The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of*

> *the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.* (3) *In light of the facts and the law so ascertained, the arbitrator reaches his decision.*
>
> In some case, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In some instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
>
> Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979 ... (emphasis added)

[59] Mustil J in *The Chrysalis*, *supra*, was of course referring to the English Arbitration Act 1979 (since amended) where the procedure is that of an "appeal" with leave, but the general principles and guidelines analysed are very relevant for our purposes. To this extent, we agree with the views expressed in *Exceljade*, *supra*, in highlighting the proper approach.

[60] In practical terms, we are persuaded that we should be looking at stage (2) of the process of reasoning as the proper focus of the inquiry under s. 42, which will mean ascertaining not so much a clear position of the "law" without regard to underlying facts, but, as analysed, the arbitrator will be ascertaining the "law" as a process comprising "not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached." Typically, this process will involve a mixed consideration of relevant statutory rules, case laws and legal principles, and an identification of the relevant facts on which to apply the "law".

This Court's Findings On The s. 42 Arguments

[61] We have therefore considered and applied these guidelines to the Questions of Law posed by the appellant. As earlier indicated, there are six Questions of Law referred to the High Court. The learned judge allowed only two of these, namely questions (v) and (vi). Although the learned Judge did not analyse the reasons for her dismissal of the other "Questions of Law", namely (i) to (iv), we find these questions to be essentially questions of facts "dressed up" as questions of law. Hence, Her Ladyship was right in dismissing them. The same cannot, however, be said as regards questions (v) and (vi), which reflect the earlier mentioned stage (2) in the process of reasoning addressed in *The Chrysalis*, *supra*. For completeness, we quote the two relevant "Questions of Law" below:

> (v) Can the arbitrator assign a ground for rejection of the plaintiff's extra over claim for boring through "hard rock" ie, failure to prove quantity of hard rock when this ground for rejection was never advanced nor contemplated by the defendant at the time of

A rejection of the claim? In seeking to determine this question the plaintiff states that the arbitrator had committed an error of law in relation to legal principles concerning estoppel in relation to contract.

(vi) Can an arbitrator whilst acknowledging and/or accepting that on the issue of quantum, the defendant only required the issue of dispute rate to be decided upon, thereafter disregard this fact and proceed to determine on his own accord the issue of quantity/length of hard rock, which issue was not raised by the defendant either in the pleadings or in the course of the arbitration. In seeking to determine this question of law, the plaintiff states that the arbitrator had committed an error of law in relation to legal principles on pleadings, admissions and the doctrine of estoppel and the rules of natural justice.

[62] Counsel for the appellant has, in the course of her submission, questioned whether it was right to duplicate the grounds under s. 37 as grounds under s. 42 of the Act. We are not persuaded why similar grounds cannot be raised under s. 42, if all the requirements under the section can be fulfilled. Accordingly, we agree and affirm the findings and conclusions of the learned judge of the High Court, as expressed in paras. [96] and [97] of Her Ladyship's judgment:

[96] For the reasons earlier stated in relation to the setting aside under section 37, because there is no dispute on quantum in that the plaintiff had to prove the length of hard rock bored, the relevant paragraphs of the Final Award as identified are indeed "manifestly unlawful and unconscionable to subsist and, thereby, justify the award to be set aside." The conclusions reached by the arbitrator are patently and obviously illogical and perverse given that the plaintiff had proved not only was rock but hard rock encountered during the works and that the plaintiff was entitled to extra costs in relation to such encounter, given that the issue of length or quantity was never in dispute between the parties, and given that the defendant had paid for the lengths claimed by the plaintiff, except at rates for "all soils". In such cases, intervention is sanctioned and the principles of law here as submitted by both parties are not in dispute.

[97] Accordingly, the learned Arbitrator's Final Award is set aside in those paragraphs and the Final Award is varied at para. 152 to read that the plaintiff's claim is allowed at RM3,300,727 with costs.

Conclusion

[63] In conclusion, and for the reasons stated above, we are dismissing this appeal with costs. The judgment and orders of the High Court are therefore affirmed.

[64] Costs of this appeal is fixed as RM30,000 to the respondent.